SUBJECT INDEX

	Page
Motion to dismiss or affirm	1
Michigan statutes involved	1
Questions presented by motion	2
Statement of the case	2
Argument—	
I There is no substantial federal question involved	4
(a) In a recent substantially similar case this Court granted a motion to dismiss	5
(b) This Act is a reasonable exercise of the state police power raising no meritorious due process question	6
(c) The Act in question contains adequate standards and in any event, improper delegation of power is a state law question	7
(d) The criminal provisions of this Act are sufficiently definite	10
II Appellant's question two has been disposed of on an adequate state procedural basis	12
Conclusion	14
Appendix	
Michigan Administrative Procedure Act	1b

TABLE OF CASES CITED

	Page
Dent v. West Virginia, 129 U.S. 114 (1889)	6
Douglas v. Noble, 261 U.S. 165 (1923)	9
England v. Louisiana State Board of Medical Examiners, 263 F 2d 661 (1959)	6
Graves v. Minnesota, 272 U.S. 425 (1926)	6
Henry v. Mississippi, 379 U.S. 443 (1965)	14
Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608 (1937)	9
Husband v. Cassell, 130 So 2d 69 (1961)	9
National Psychological Ass'n v. University of New York, 8 NY 2d 197, 203 NYS 2d 821, 168 NE 2d 649 (1960) 363 U.S. 298 (1961)	5
Nebbia v. New York, 291 U.S. 502 (1934)	7
Nelles v. Bartlett and Sculthorp, 5 Mich. App. 47 (1966)	3
Roth v. United States, 354 U.S. 476 (1957) reh. den. 355 U.S. 852 (1958)	10
Watson v. Maryland, 218 U.S. 173 (1910)	6

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1966

No.

WESLEY G. NELLES,

Appellant,

v.

LYNN M. BARTLETT, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF MICHIGAN,

and

LENTON G. SOULTHORP, SUCCESSOR TO LYNN M. BARTLETT,

Appellees.

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16, paragraph (b) of the Rules of this Court, move that the appeal be dismissed or alternatively to affirm the judgment of the Michigan Court of Appeals, on the grounds that question one (Jurisdictional Statement, page 14, 15) does not present a substantial federal question and the judgment, in relation to question two, (Jurisdictional Statement, page 15) rests on an adequate non-federal basis.

MICHIGAN STATUTES INVOLVED

The Michigan statutes pertinent to this case are the Michigan Psychologist Registration Act (Act 257, PA

1959, as amended, being CLS 1961, §338.1001, et seq; MSA 1965 Cum Supp §14.677(1), et seq) and Act 197, PA 1952, as amended, being CLS 1961 §§24.100, et seq; MSA 1961 Rev Vol §§3.560(21.1), et seq) providing for rules of administrative procedure and judicial review of administrative decisions.

QUESTIONS PRESENTED BY THIS MOTION TO DISMISS OR AFFIRM

The questions presented by this motion of appellees to dismiss or affirm are the following:

1. DOES APPELLANT RAISE A SUBSTANTIAL FEDERAL QUESTION BY HIS CONTENTION THT THE MICHIGAN PSYCHOLOGIST REGISTRATION ACT VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

2. DOES THE JUDGMENT, IN RELATION TO ANY QUESTION CONCERNING THE APPLICATION OF SAID ACT TO APPELLANT, IN DENYING HIM CERTIFICATION, REST ON AN ADEQUATE STATE PROCEDURAL BASIS?

STATEMENT OF THE CASE

The substantive statute involved in this case is the Michigan Psychologist Registration (Act 257, PA 1959, as amended, being CLS 1961, §338.1001, et seq; MSA 1965 Cum Supp §14.677(1) et seq.). Section 8 of the Act allowed the certification of those who could not meet the

formal education requirements of the other sections, for a period of two years after the Act's effective date.

On December 13, 1960, plaintiff applied for certification as a consulting psychologist under Section 8 and certification was denied. Section 8 was amended by Act 132, PA 1961 to provide for a hearing. On June 29, 1961, appellant requested a hearing and a formal hearing with the requisite notice was had and a transcript was taken. Appellant's application was again denied on January 29, 1962.

On March 15, 1962, appellant brought an action in Circuit Court contesting the constitutionality of the Act and in the alternative, requesting an order requiring defendant to certify appellant pursuant to Section 8. Appellant did not seek to review the decision of appellee pursuant to the recognized and available methods of reviewing an administrative decision. The Circuit Court dismissed the complaint on the grounds that the Act was constitutional and that the Circuit Court lacked jurisdiction to mandamus a state officer. The Circuit Court, however, granted an injunction against enforcement of the Act until a decision of the Court of Appeals.

The Court of Appeals entered its decision in this matter on November 9, 1966 (5 Mich. App. 47). It found that

(1) plaintiff did not seek timely review of the decision of the administrative agency, and

(2) the Psychologist Registration Act was not in conflict with the United States or Michigan Constitution.

The Michigan Supreme Court on January 16, 1967, de-

nied the application for leave to appeal filed by appellant "for the reasons that plaintiff-appellant has failed to persuade the Court that he has a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous." On March 14, 1967, the Michigan Supreme Court denied a motion for rehearing "for the reason that it does not appear that the order of January 16, 1967, denying leave to appeal was erroneously made."

On May 5, 1967, the Michigan Court of Appeals granted a ten day stay to appellant on condition that appellant file an application for a stay with this Court or with a Justice thereof and on condition that an appeal be noted to this Court. Appellant allowed nearly sixty days to elapse after the Michigan Supreme Court denied the motion for rehearing before he applied to this Court for a stay on May 12, 1967.

On May 15, 1967, the Michigan Court of Appeals granted a continuance of the stay granted May 5, 1967 until June 15, 1967, or until appellant's petition for a stay filed with this Court is determined, whichever is prior in time.

On May 24, 1967, appellant's petition for stay was denied by Justice Potter Stewart. Appellees received appellant's Jurisdictional Statement on July 3, 1967.

ARGUMENT

I

There is no substantial federal question involved in determining the constitutionality of the Michigan Psychologist Registration Act.

(a) In a recent decision of this Court, in a substantially similar case, this Court granted a motion to dismiss upon the ground that there was no substantial federal question involved.

A very similar New York act was upheld against constitutional objections in *National Psychological Ass'n v. University of New York*, 8 NY 2d, 197, 203 NYS 2d, 821, 168 NE 2d 649 (1960). This Court dismissed an appeal therefrom "For want of a substantial federal question." 365 U.S. 298 (1961).

An examination of both the New York and Michigan statutes shows there is no basic difference between them. Both make certification a prerequisite to holding oneself out to the public as a psychologist in connection with offering to render or rendering services as such for a fee. Both provide criminal penalties for doing so without certification. Neither prohibits non-certificants from merely rendering psychological services. Each statute has certain educational, experience, and examination requirements to be met before certification is granted. Finally, both states have judicial remedies available to review administrative decisions on certification.

In the above cited New York case, the New York Court of Appeals stated that the statute in question, being clearly related to public health and welfare, was a proper exercise of the state's police power under the due process clause of the Fourteenth Amendment to the United States Constitution. Further, the Court held that the statute contained clearly discernible standards for administrative guidance and met any requirement of definiteness imposed upon criminal statutes.

A comparison of this case with the above cited New

York case reveals that no new due process questions are raised by the instant case. Thus, this Court should again grant a motion to dismiss for want of a substantial federal question.

(b) This Act regulating psychologists by certification is a reasonable exercise of the state police power raising no meritorious due process question.

This Court has consistently upheld the police power of the states to regulate the practice of medicine and the related healing arts. *Dent v. West Virginia*, 129 U.S. 114 (1889); *Watson v. Maryland*, 218 U.S. 173 (1910); *Graves v. Minnesota*, 272 U.S. 425 (1926). In 1959 a lower federal court had occasion to examine decisions of this Court in a search for guidance in the medical regulation area. That examination brought forth the following summary statement:

> "In review of the cases discussed, supra, it is of interest to note that the Supreme Court has never changed its policy of reviewing with reluctance and self-restraint state regulations in the medical field, even though other state economic regulations have met a fluctuating substantive due process stand." *England v. Louisiana State Board of Medical Examiners*, 263 F 2d 661, 673, (1959).

The means of regulation in the Act are reasonable in that only the privilege of advertising oneself to the public as a psychologist offering services for value is denied to non-certificants. This mild regulatory form is clearly related to the salutary statutory objective of protecting the public from unqualified persons rendering psychological services. It follows that the requirements of due pro-

cess contained in *Nebbia v. New York*, 291 U.S. 502, 525, (1934) are met.

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." P. 525.

(c) The Act in question contains adequate standards for administrative implementation and in any event, the question of improper delegation of power is a state law question.

In support of the contention that the Act in question contains adequate standards, the so-called "grandfather clause" in Section 8, under which appellant sought certification as a consulting psychologist, is set out below:

> "§14.677(8) Certification without examination, conditions, limitation, reciprocity, educational requirements, modification.]
>
> "Sec. 8. (1) For a period of 2 years after the effective date of this act, the superintendent may certify, with or without examination as consulting psychologists, psychologists and psychological examiners or technicians, any person:
>
> "(a) Who meets the requirements of subdivisions (1), (2) and (3) of Section 3.

"(b) Who by the quality and duration of his experience is judged by the superintendent to have qualifications equivalent to those offered by the educational requirements of the provisions of this act governing certification at the various levels.

(c) Who has been engaged in full-time psychological work at the appropriate level for at least 5 years within the 10 year period next preceding the effective date of this Act.

(d) Who pays the certificate fees required under sections 3, 4 or 6 of this act.

[(e) Any applicant denied certification under this section shall upon written request be afforded a hearing as provided for under section 10 of this act.]"

The statutory provisions referred to in Section 8 are set out below.

"§14.677(3) Applicants for certification; qualification.] Sec. 3. Every applicant for certification under this act shall: (1) be of good moral character and reputation, (2) be a citizen of the United States or have declared his intention of becoming one, (3) be at least 21 years of age.

"§14.677(4) Consulting psychologist certification; qualifications of applicant; fees.] Sec. 4. Except as provided in this act, every applicant for certification as a consulting psychologist shall meet the following requirements, in addition to those specified in section 3.

(1) Be duly graduated with a doctoral degree or its

equivalent, from a reputable institution generally so recognized at the time of granting of such degree.

(5) Have paid a certificate fee and, where an examination is required, an examination fee. The examination fee and the certificate fee shall be $25.00 and $15.00, respectively."

Thus, we find in those portions of the Act under which appellant sought certification reasonably precise standards as to moral character and reputation, citizenship, and age. Further, we find the educational requirement to be qualifications equivalent to a doctoral degree in psychology, or its equivalent, from a reputable institution generally so recognized. Finally, there is a requirement of full-time psychological work for a defined period of time. It is submitted that these clear guidelines effectively preclude the existence of arbitrary and capricious administrative power under the Act.

The Michigan Court of Appeals fully considered this issue and concluded as follows:

"When the act is read as a whole, the legislative policy is apparent from the reasonably prescribed standards seen within the act." (Jurisdictional Statement, Page 46).

Furthermore, the question of improper delegation of legislative power is not a federal question. Rather, it is a state law question. *Douglas v. Noble*, 261 U.S. 165, 168 (1923); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 611-613 (1937). This principle is well illustrated by an examination of *Husband v. Cassell*, 130 So 2d 69 (1961), a case upon which appellant relies heavily and the only case appellant cites in his jurisdictional statement that deals

with a state statute regulating the certification of psychologists.

This case considered the constitutional validity of a Florida statute providing for certification of psychologists. It was decided by the Florida Supreme Court solely on a state law basis. The Florida Court held that the statute, lacking sufficient standards for administrative implementation, was thus an invalid delegation of legislative power contrary to the provision in the Florida constitution vesting the legislative power of the state in the legislature.

The portions of the Act quoted above demonstrate the soundness of the conclusion reached by the Michigan Court of Appeals that this statute contains an adequate expression of legislative policy for administrative guidance. Furthermore, it has been demonstrated that the question of improper delegation of legislative power is answered by reference to state rather than federal law.

(d) The provisions of this Act relating to criminal prosecution, which have never been invoked against appellant, are sufficiently definite to meet any void for vagueness test.

Appellant attacks the Act as being unconstitutionally vague and indefinite. This Court has used a void for vagueness rule in testing criminal statutes. *Roth v. United States*, 354 U.S. 476, (1957) reh. den. 355 U.S. 852 (1958). The purpose underlying that rule is to require sufficient notice of the type of activity which is made criminal. This Act, as demonstrated by the criminal provisions set out below, certainly gives sufficient notice of the criminal activity proscribed.

No person may use the titles, "certified consulting psychologist," "certified psychological technician" unless he has a certificate specifying him to be such under the provisions of this act. Certified psychological examiners or technicians may use the title "certified psychological assistant" in any case where they are permitted to use their certification titles under the provisions of this act."

"§14.677(12) Advertising or misrepresentation as psychologist; prohibition.] Sec. 12. No person, other than an active certified consulting psychologist, may advertise or represent himself to the public in any way which will lead the public to believe that he is a psychologist or that he is rendering or offering to render psychological services. A person is so advertising or representing himself within the meaning of this section if:

(a) He uses or allows to be used in describing himself or his services in any kind of advertising or representation such terms as, by way of illustration but not of limitation, psychologist and psychological, psychoconsultant and psychoconsultation, psychotechnician and psychotechnical, psychometrician and psychometric, psychophysicist and psychophysical; and

(b) In connection with such advertising or representation, he renders or offers to render services for or in expectation of a fee or anything of value."

Thus, it is clear that this Act prohibits non-certificants from using certain titles or from advertising themselves or their services to the public by the use of certain words in connection with offering to render or rendering psychological services for anything of value. Anyone who reads these

provisions will be aware of the type of activity prohibited.

Appellant's contention that the Act is unconstitutionally vague and indefinite is untenable in view of the specific criminal prohibitions set out above. Appellant, in his jurisdictional statement, cites no authority to support his void for vagueness argument. Finally, it should be remembered that appellant has never been prosecuted under this Act.

II

The judgment, in regard to Appellant's question two (Jurisdictional Statement, page 15) concerning application of the Act to Appellant, in denying him certification, rests on an adequate state procedural basis.

This problem was considered at length by the unanimous Michigan Court of Appeals opinion in this case. (Jurisdictional Statement, pages 43-46). That opinion approved dismissal of appellant's complaint by the trial court.

The Court of Appeals first ruled that the Michigan administrative procedures act (Appendix, pp 1b-8b) was applicable to the procedure for obtaining a psychologist's certification from the Superintendent of Public Instruction. Section 8 of the administrative procedures act (Appendix, p 6b) provides for judicial review of the actions of state agencies by the filing of an action in the appropriate circuit court within 30 days after personal service or after the mailing of the final decision of said agency. The Court of Appeals pointed out that appellant did not pursue this statutorily provided remedy. In fact, appellant's complaint, as originally filed in the trial court, made no attempt to request review of the administrative decision denying him certification. Rather, the complaint, in circumvention of

the procedure provided for court review of administrative decisions, demanded an injunction restraining appellee from interfering with the appellant's practice of psychology and, in the event the act should be found constitutional, an order requiring appellee to certify appellant as a consulting psychologist. Additionally, the complaint attacked the constitutionality of the Michigan Psychologist Registration Act.

The Court of Appeals also noted that even construing the complaint as a request for judicial review of the administrative decision, it was filed too late to preserve the right to judicial review under the 30 day time limit found in Section 8 of the administrative procedures act. (Appendix, p 6b) The final agency decision was mailed to both appellant and his attorney on January 29, 1962, and the original complaint was not filed until March 15, 1962.

The Court of Appeals concluded that appellant had failed to timely or properly pursue his judicial remedy, provided for by the administrative procedure act, (Appendix, pp 6b-8b) to review a final decision of a state agency. Consequently, the Court of Appeals did not deal with any substantive issues, constitutional or otherwise, relating to the application of the Michigan Psychologist Registration Act to appellant, in denying him certification.

It should also be pointed out that Section 8 (6) (a) (Appendix, p 7b) of the administrative procedures act specifically authorizes the circuit court to reverse or modify an agency decision if in violation of constitutional provisions. Also, Section 9 (Appendix, p 8b) of the administrative procedures act provides for appeal of any final circuit court judgment under said act.

Consequently, it is clear that under Michigan law appel-

lant had both the right and the opportunity to obtain full judicial review of the application of the Michigan Psychologist Registration Act to appellant, in refusing him certification. He did not do so in a timely or proper fashion under applicable state procedural requirements.

This Court has consistently refused to review state court judgments resting on adequate substantive or procedural state grounds. It is also true that whether non-compliance with state procedure precludes this Court from considering federal questions is itself a federal question. The test is whether a state's insistence on compliance with a rule of procedure serves a legitimate state interest. Once the test is met, this court is precluded from reviewing any federal claim put forth in the state litigation that is disposed of by the adequate state procedural ground. *Henry v. Mississippi*, 379 U.S. 443, 446-448, (1965).

Michigan has a definite interest in requiring litigants to adhere to the procedure for court review of administrative decisions provided by statute. Such a requirement is necessary to implement the orderly and integrated statutory scheme of administrative procedure and judicial review of such procedure found in the administrative procedure act. (Appendix, pp 1b-8b) This is clearly a legitimate state interest. Thus, any question concerning application of the Psychologist Registration Act to appellant has been disposed of on an adequate state procedural basis.

CONCLUSION

Appellees urge the Court to dismiss or alternatively to affirm the judgment of the Michigan Court of Appeals on the grounds that question one (Jurisdictional Statement, page 14, 15) does not present a substantial federal question

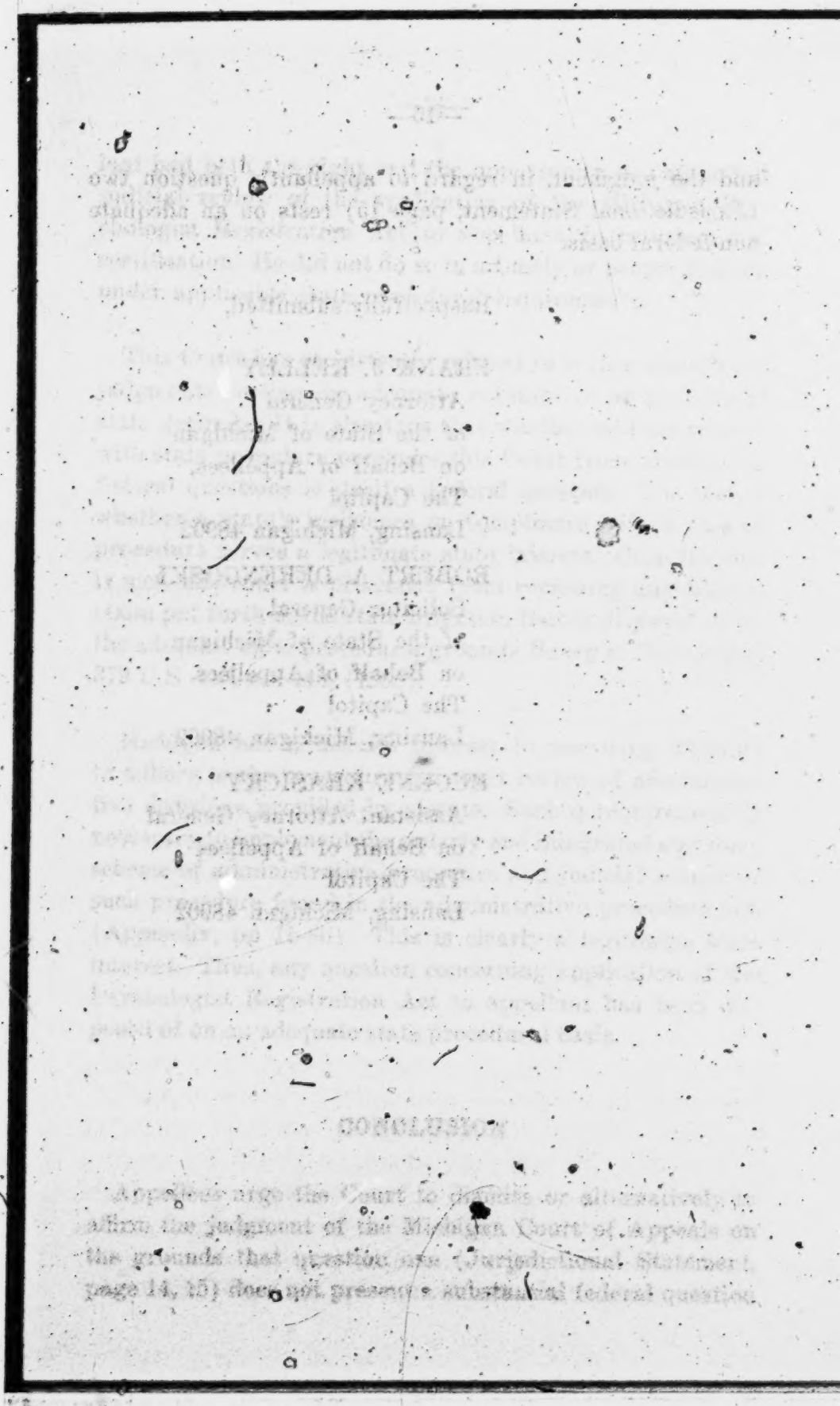
and the judgment, in regard to appellant's question two (Jurisdictional Statement, page 15) rests on an adequate non-federal basis.

Respectfully submitted,

FRANK J. KELLEY
Attorney General
of the State of Michigan
on Behalf of Appellees,
The Capitol
Lansing, Michigan 48902

ROBERT A. DERENGOSKI
Solicitor General
of the State of Michigan
on Behalf of Appellees,
The Capitol
Lansing, Michigan 48902

EUGENE KRASICKY
Assistant Attorney General
on Behalf of Appellees
The Capitol
Lansing, Michigan 48902



APPENDIX